

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

UNITED STATES OF AMERICA

v.

FRANK RUSSELL MCCOY

Case No. 1:07-CR-18-WLS

MOTION TO STRIKE

Comes now Defendant, Frank Russell McCoy, by and through undersigned counsel, Morad Fakhimi; and, herewith directs this Court's attention to the government's contravention of its Order of December 9, 2008 (Doc. 66 at 2-3). In support of which, the Defendant submits the following.

On November 11, 2008, the government filed a *Motion to Seal Document or in the Alternative for a Protective Order* (Doc. 52), complaining that "counsel for the defendant caused the stories to be placed in public domain view by filing them as an attachment to certain motions they filed on the PACER/ECF filing system" — on the same day, the government also declared that "[w]hy counsel for the defendant would further cause the obscene materials to be distributed by placing them in the public domain via PACER/ECF is inexplicable." (*see* Doc. 54). The Defendant responded that these stories were the subject of a prior final federal court decree which had declared them to be non-obscene protected speech; and that the government had, by its own hand, made the stories publically available in the public domain by moving to unseal the same stories on the docket of another federal court.

On December 9, 2008, this Court granted the government's motion to seal the attachments to the Defendant's filings found at Docket Nos. 49 and 50 — ordering that "both the Government and

Defendant are hereby ORDERED not to file any of the textual stories or materials which form the basis of the indictment against Defendant, unless the same are filed under seal or by prior permission of the Court.” (Doc. 66 at 2 - 3). On December 29, 2008, the government filed its *Response* (Doc. 75) to Mr. McCoy’s *Amended Motion to Dismiss the Indictment for Failure to State an Offense* (Doc. 72). Appended to its *Response*, the government has filed three attachments (labeled Exhibits 1 - 3), all appearing on the publicly available docket of this Court. Specifically, Exhibit 3 (to Doc. 75) is a 1-page NCMEC report, to which is attached an 8-page “textual story[] or material[] which form[s] the basis of the indictment against Defendant” — and, as it does not appear that the government sought prior permission from the Court to do so, it would appear that this Court’s Order of December 9, 2008 (Doc. 66) has been violated.

To put it in government counsel’s own words – what is “inexplicable” is that the government would first move the Minnesota federal court to unseal these stories in May of 2008 (thereby making them publically available through the clerk of that court); then, months later, complain vehemently that counsel for the Defendant has attached to a filing before this Court a warrant application (containing the stories) and a transcript excerpt (containing discussion about the stories); and upon securing an Order from this Court to the effect that such stories shall not be filed on the public docket of the Court, the government then immediately violates that Order and files such a story (at Exhibit 3 to Doc. 75).

Mr. McCoy’s previously stated position regarding the various reasons not to seal these stories notwithstanding – the Defendant maintains that the circumstances that gave rise to the government’s virtually immediate derogation of this Court’s Order of December 9, 2008, (Doc. 66) present a suitable subject for sanctions – but, at the very least, Mr. McCoy would urge that the Court issue an

order to the effect that the government's *Response* (Doc. 75) be stricken from the record, and that it be ordered to re-file a document that complies with all docketed orders of this Court.

Conclusion

Based on the forgoing, Mr. McCoy respectfully requests that this Court strike the government's *Response* (Doc. 75) from the record on grounds that it violates this Court's Order of December 9, 2008.

Dated: This 30th day of December, 2008.

Respectfully submitted,

/s/ Morad Fakhimi
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CERTIFICATE OF SERVICE

I, Morad Fakhimi, hereby certify that on December 30, 2008, I electronically filed the foregoing *Motion to Strike* with the clerk of Court using the CM/ECF system which will send notification of such to all counsel of record.

/s/ Morad Fakhimi
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